The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, et al.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE, et al.,

Defendants.

No. 2:18-cv-01115-RSL

PRIVATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Argument

Suppose that in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Bolling v. Sharpe*, 347 U.S. 497 (1954), federal agencies stopped segregating school services *but* failed to satisfy all APA technicalities in doing so. Could recalcitrant states use an APA suit to force federal officials *to reinstitute segregation policies*? Of course not. The Constitution is always paramount.

Suppose that in the wake of *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), federal tax agencies ceased discriminating against same-sex couples *but* violated an APA technicality in doing so. Could states use the APA to force federal officials *to reinstitute the discriminatory policies*? No. The Constitution still prevails.

And yet here we are. In the wake of *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."), *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."), *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it."), and *Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) ("[I]t would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.")—not to mention *District of Columbia v. Heller*, 554 U.S. 570 (2008)—the State Department rightly ceased violating Defense Distributed and the Second Amendment Foundation's constitutional rights by freeing them from ITAR's content-based prior restraint. But now recalcitrant states want an order forcing federal officials to re-impose that unconstitutional regime on the theory that the "*First Amendment is irrelevant*." Dkt. 186 at 20. That cannot be so. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

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On the merits, the Plaintiff States' attempt to have the Administrative Procedure Act override the First Amendment can never work. For in this Union, states can neither violate the Constitution themselves nor commandeer the federal government to do their unconstitutional bidding. But the merits should not be reached because of a more fundamental fault: no standing.

The Plaintiff States have suffered no legally cognizable injury at all, let alone one inflicted by a defendant in this case. Nor do traceability or redressability exist because the whole world already has the files at issue, and always will. Defense Distributed published them to the internet's public domain for **five full days** before the preliminary injunction, and ever since then, a multitude of independent users has persistently and increasingly republished them *despite the injunction*. This state of affairs simply cannot be controlled by a court judgment. The case must be dismissed.

I. Standing does not exist.

The Court lacks subject-matter jurisdiction for five separate reasons, the most drastic of which is lack of standing. Dkt. 174 at 4-8. These issues must be evaluated in full—not discounted due to prior briefing—because "federal courts have a continuing, independent obligation to determine whether subject matter jurisdiction exists." *Mashiri v. Dep't of Educ.*, 724 F.3d 1028, 1031 (9th Cir. 2013). That obligation is especially strong because of an important new decision about the legal doctrine being invoked and because of new jurisdictional evidence.

The Plaintiff States give standing short shrift. In a quiet footnote, their most recent filing says nothing but that "previous briefing . . . addresses the Private Defendants' already-rejected challenges to standing." Dkt. 186 at 9 n.9. This will not suffice. Fortunately, though, the Plaintiff States supplied their true view about standing law in another brief. It just so happens to have been submitted to another court.

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A. The Plaintiffs States' own filings defeat their standing argument.

Standing questions just like the ones in this case arose in *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam) (No. 15-674). There, fifteen of the instant Plaintiff States filed an *amicus* brief focusing on standing law for state APA actions against the federal government. Amicus Brief of the States of Washington, et al. in Support of Petitioners, *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam), 2016 WL 922867. That brief's reasoning shows why no standing exists here.

First, the Plaintiff States' Supreme Court brief said that state standing did not exist because that case's plaintiffs "filed this suit, not because they are suffering any meaningful harm, but rather to achieve a political goal that they could not achieve through the political process." *Id.* at *1. So too here. The plaintiffs' politicians loathe citizens who speak about realizing the Second Amendment's guarantees; but the speech they want to ban has broken no law, state or federal.

Next, the Plaintiff States' Supreme Court brief said that state standing did not exist because that state's injury argument "relies on a false premise - that the [agency action] requires States to do anything at all." *Id.* at *3. So too here. The Temporary Modification and License require literally nothing of the Plaintiff States, who remain as free as they have ever been to both enact and enforce criminal laws of their choosing (subject, of course, to the Constitution).

Next, the Plaintiff States' Supreme Court brief said that "self-inflicted 'harms'" cannot suffice to create a state's standing. *Id.* at 5. So too here. If the Plaintiff States decide to update security practices because of technological change, "doing so will be a state choice, 'not the result of federal coercion.'" *Id.* at *4 (quoting *Texas v. United States*, 106 F.3d 661, 666 (5th Cir. 1997)).

If the rules that the Plaintiff States embraced in their Supreme Court brief were applied here, they would compel the conclusion that no standing exists. The Plaintiff States should be held to their own standards, even when political tables have turned.

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B. Traceability and redressability are missing.

This action's lack of traceability and redressability gets worse with every passing day. In March, the Private Defendants supplied a wealth of evidence proving that the "computer files that the Plaintiff States have made this litigation about already belong to the public domain." Dkt. 174 at 3 & nn.5-6. Since then, even more authority confirms the standing problem's factual basis.

Just last month, a leading technologist confirmed that the internet's publication of Defense Distributed's digital firearms information is "unstoppable": "There is no way to stop the anonymous file sharing of 3D-printed guns online." Jake Hanrahan, *3D-printed guns are back, and this time they are unstoppable,* Wired Magazine, May 20, 2019, available at http://bit.ly/2MtWcZf. "As of now," the report says, the "thousands many more 3D-printed gun enthusiasts connected to each other worldwide" have "essentially let the cat out the bag." *Id.* Defense Distributed's files are "available for free." *Id.* It is "already too late to stop." *Id.*

This reality's technical basis bears emphasis. "A decentralised network of gun-printing advocates is mobilising online, they're anonymously sharing blueprints, advice and building a community." *Id.* "Unlike previous attempts to popularise 3D-printed guns, this operation is entirely decentralised." *Id.* "There's no headquarters, no trademarks, and no real leader." *Id.* Hosts include a network of gun-printing advocates that communicate across multiple peer-to-peer ("P2P") networks beyond any government's reach. *See* John Crump, *The Unstoppable 3D Gun Revolution Continues to Heat Up*, Ammoland, May 30, 3019, available at http://bit.ly/2WkgpjV. "Since there is not a central server, there is nothing to shut down." *Id.* "If one node is shut down multiple other nodes pop up." *Id.* The "distributors of these files seem to be unstoppable." *Id.*

Hence, all of the files at issue in this case remain easily accessible by way of rudimentary Google queries. Every website exhibited in the Private Defendants' last brief remains intact,

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continuing to make their files available for anyone to download for free. *See* Dkt. 174 at 3 nn.5-6.[1]

Critically, all of this has taken place despite the Court's entry of a preliminary injunction that does everything the Plaintiff States seek in their prayer for permanent relief. In effect, the preliminary injunction has proven to be impotent. This experience shows that the requested final judgment will be ineffective at redressing the Plaintiff States' supposed injuries.

C. *Parens patriae* standing cannot be used against the federal government.

The Plaintiff States' only serious standing argument invokes the *parens patriae* doctrine, which sometimes "allows a State to sue in a representative capacity to vindicate its citizens' interests." *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 178 (D.C. Cir. 2019). But as a matter of law, the Plaintiff States cannot use *parens patriae* here because their claims are against the federal government. "The traditional rule, the so-called '*Mellon* bar,' declares that a State lacks standing as *parens patriae* to bring an action against the federal government." *Id.* at 179.

The solution suggested by previous briefs was *Massachusetts v. EPA*, 549 U.S. 497 (2007). According to the Plaintiff States' prior filings, footnote 17 of *Massachusetts v. EPA* eliminated this limitation and held that states *can* use *parens patriae* standing against the federal government. Dkt. 68 at 11. But a new precedent decisively establishes that the Plaintiff States' reading of *Massachusetts v. EPA* is wrong. Footnote 17 does not change standing law as they say. The bar on states using *parens patriae* standing against the federal government remains.

Last month, the D.C. Circuit confronted and rejected the exact *parens patriae* argument being made by the Plaintiff States here. *Bernhardt*, 923 F.3d at 181-83. There, as here, a state tried to argue that footnote 17 of *Massachusetts v. EPA* lets states employ *parens patriae* standing in APA actions against the federal government. *Id.* But in a unanimous and thorough decision,

[1] Meanwhile, the summary judgment record indicates that Defense Distributed and the Second Amendment Foundation are the only Second Amendment advocates to have received any serious legal attention from the Plaintiff States.

the D.C. Circuit rejected that argument: "In the end, we are unpersuaded by Missouri's argument that *Massachusetts v. EPA* alters our longstanding precedent that a State in general lacks *parens patriae* standing to sue the federal government." *Id.* at 183.

The argument stemming from footnote 17 is both an incorrect reading of *Massachusetts v. EPA* and wrong in principle. "The general supremacy of federal law" means "that the federal *parens patriae* power should not, as a rule, be subject to the intervention of states seeking to represent the same interest of the same citizens." *Id.* For that reason, a "state can not have a quasi-sovereign interest because" matters of federal law "fall[ ] within the sovereignty of the Federal Government." *Id.* (omission in original).

Bernhardt is decisive. *Massachusetts v. EPA* did not eliminate the bar on states using *parens patriae* standing against the federal government. The Plaintiff States have no answer to this categorial flaw in their case, which is why their latest brief ignores the issue entirely.

II. Defense Distributed should be dismissed for lack of personal jurisdiction.

A. No waiver occurred.

The Plaintiff States argue that Defense Distributed waived its personal jurisdiction defense because Rule 12(h)(1)(A) supposedly says that "a party waives the defense of lack of personal jurisdiction by 'omitting it from a motion' under Rule 12." Dkt. 186 at 19. But the cited provision never says that (and neither does sole cited case). The waiver argument plainly misreads the rule.

What Rule 12(h)(1)(A) *does* say is that waiver occurs if the defense is omitted a "from a motion *in the circumstances described in Rule 12(g)(2)*." Fed. R. Civ. P. 12(h)(1)(A) (emphasis added). The "circumstances described in Rule 12(g)(2)," in turn, exist by definition only when a defendant files *multiple Rule 12 motions*:

> Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make ***another motion under this rule*** raising a defense or objection that was available to the party but omitted from its earlier motion.

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Fed. R. Civ. P. 12(g)(2) (emphasis added).[2] Not so here.

Defense Distributed made only one motion under Rule 12. Dkt. 114. They never filed "another motion under this rule" (Rule 12) because the instant summary-judgment filings are under Rule 56. These are not "the circumstances described in Rule 12(g)(2)." No Rule 12(h)(1)(A) waiver occurred.

Support for Defense Distributed's method of challenging personal jurisdiction comes from Rule 12(b)'s use of "must" and "may." That provision says that litigants "must" assert a personal jurisdiction defense in a pleading (Defense Distributed did that, *see* Dkt. 81 at 42), and that litigants "may" assert the defense in a Rule 12 motion. Fed. R. Civ. P. 12(b). Since "may" is permissive, asserting the defense in a Rule 12 motion is not required. It is optional.

Support for Defense Distributed's method of challenging personal jurisdiction also comes from Rule 12(h)(1)(B)(ii)'s use of "either" and "or." That provision shows that the defense of personal jurisdiction is preserved where, as here, the defendant has "either" made it by a Rule 12 motion "or" "include[d] it in a responsive pleading." Fed. R. Civ. P. 12(h)(1)(B)(ii).

This is not a "convoluted non-waiver theory." Dkt. 186 at 19. It is straightforward construction that gives a logical meaning to each part of Rule 12. The Plaintiff States' position, in contrast, would work only if Rule 12(b) changed "may" to "must" and Rule 12(h)(1)(B)(ii) changed "either" and "or" to "both" and "and." As it stands, Rule 12 says no such thing.

B. DEFCAD's free downloads do not create minimum contacts.

Substantively, the Plaintiff States say that personal jurisdiction exists because Defense Distributed's website (DEFCAD) "actively invites visitors to download CAD files." Dkt. 186 at 19. But the Plaintiff States did not plead anything about how interactive the website is, let alone

[2] Those circumstances existed in the lone cited case because the defendant filed *multiple* Rule 12 motions. *Schnabel v. Lui*, 302 F.3d 1023, 1027-28 (9th Cir. 2002).

prove it with any evidence. The complaint says nothing more than that the website makes files "available for download," Dkt. 29 at 4, 10, because that is the fact of the matter.

Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997), does not support personal jurisdiction here. The Plaintiff States try to shoehorn Defense Distributed's situation into this quotation: "If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper." Dkt. 186 at 19 (quoting *Zippo*, 952 F. Supp. at 1124). But the keystone fact of business "contracts with residents" is missing. The complaint never speaks of the website creating contractual relationships for these downloads, and neither does evidence. *See* Dkt. 174-01 at 3 ("Defense Distributed posted . . . on DEFCAD for free download by the public.").

The Court should look not to the sentence quoted by the Plaintiff States, but to the one right after it. DEFCAD fits squarely within what *Zippo* frames as the "opposite end" of the spectrum. *Zippo*, 952 F. Supp. at 1124. Under *Zippo*, Defense Distributed's online file publications constitute the kind of "passive" website activity that does *not* confer personal jurisdiction:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. *At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction.*

Id. at 1124 (emphasis added) (citations omitted).

Besides quoting the wrong part of *Zippo*, the Plaintiff States refuse to address three critical jurisdictional faults in their position. They never address the rule that "contacts count towards purposeful availment only if they are created by the 'defendant himself'—not if they are created by 'plaintiffs or third parties.'" Dkt. 174 at 10 (quoting *Walden v. Fiore*, 571 U.S. 277, 284

(2014)). They never address the rule that "'minimum contacts' analysis looks to the defendant's contacts with *the forum State itself*, not the defendant's contacts with *persons who reside there*." *Id.* (quoting *Walden*, 571 U.S. at 285). And they never address the rule that hypothesized future forum contacts cannot count towards what must be a present purposeful availment inquiry. *Id.* at 10-11. Each of these unanswered arguments presents an independent reason to dismiss the case against Defense Distributed for lack of personal jurisdiction.

III. The APA cannot require abridgement of First Amendment freedoms.

Two crucial sets of authority about the Constitution's interaction with the APA have gone totally ignored. First is 5 U.S.C. § 702, which says that, even when the APA's internal thresholds for relief are met, reviewing courts must still determine whether or not there is a "duty of the court to . . . deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702. Thus, to the extent that an APA plaintiff's requested relief would violate the First Amendment, § 702 requires the reviewing court to "deny relief" on this Constitutional "ground." *See* Dkt. 174 at 20.

Indeed, this would be required even in § 702's absence due to elementary principles of constitutional law. *See infra* at 1. Like every other statute, the APA is subject to the rule that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Am 1. So even if the APA purported to authorize judgments that abridge the freedom of speech (it does not), the First Amendment's overriding command would nullify it.

The other ignored authorities are *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960), and *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160-61 (9th Cir. 2010). They stand for the proposition that courts cannot issue orders of any kind—even things as relatively commonplace as discovery orders—that have the "practical effect" of denying First Amendment rights. Dkt. 174 at 20. This doctrine is one of the "appropriate

legal or equitable ground[s]" that has to be evaluated before APA relief can be issued.

All of these principles carry special weight where, as here, the law's constitutional infirmity comes not just from instances of its enforcement against the citizenry, but also from the chilling effect created by its mere existence on the books. *See Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."); *Dana's R.R. Supply v. Att'y Gen., Flo.*, 807 F.3d 1235, 1241 (11th Cir. 2015) ("Litigants who are being 'chilled from engaging in constitutional activity,' . . . suffer a discrete harm independent of enforcement . . . .").

None of this is addressed in the Plaintiff States' brief. Talk about what a court can and cannot consider under *Chenery* is inapposite, for that goes only to the predicate determination of what the APA's internal procedural requirements entail. *After* the internal APA analysis occurs, courts are always obliged to ensure that a sought-after judgment does not violate the Constitution.

IV. The Plaintiff States' APA claims against the Federal Defendants fail.

A. Notification issues do not support any relief.

The Plaintiff States continue to argue that "[t]he Temporary Modification and Letter deregulating 3D-printed firearm files violate AECA's congressional notice provisions . . . ." Dkt. 186 at 1. But they never show why notification requirements at 22 U.S.C. § 2778(f) apply to the License or Temporary Modification. In truth, "[n]othing has been removed from the USML by the Settlement Agreement, and, thus, no section 38(f) notice was required as a result of the Settlement Agreement." Dkt. 48-1 at 110.

Additionally, the Plaintiff States fail to realize that, apart from a notification about a commodity or item itself, no *separate* notification for technical data about a commodity or item is needed. "The jurisdiction of the technical data follows the jurisdiction of the related commodity

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or item." 78 Fed. Reg. 22740, 22748 (April 16, 2013). This follow-on structure is how all transfers to the EAR under export control reform work. *See* 81 Fed. Reg. 70340 (Oct. 12, 2016) at 70357; 81 Fed. Reg. 49531 (July 28, 2016) at 49538 and 49539; 79 Fed. Reg. 37536 (July 1, 2014) at 37545; 79 Fed. Reg. 27180 (May 13, 2014) at 27185 to 27186 and 27188; 79 Fed. Reg. 34 (Jan. 2, 2014) at 41, 44, 45, and 46; 78 Fed. Reg. 40922 (July 8, 2013) at 40928, 40929, and 40931; 78 Fed. Reg. 22740 (April 16, 2013) at 22757 and 22758.

Even if the License and Temporary Modification constitute removals (they do not), notification of the proposed removal of firearms and associated technical data (which includes the subject files) was reportedly provided to Congress on February 4, 2019. Dkt. 174 at 18. Since this notice, Congress could have blocked the removal (by, for example, Joint Resolution), but has chosen *not* to do so.

B. There was no reversal of longstanding regulation with regard to the license or temporary modification.

The Plaintiff States are wrong to assert that the State Department's actions entail an "abrupt reversal of its longstanding regulation of the subject files." Dkt. 186 at 1. The State Department has disclaimed control of public speech under the ITAR for 30 years.

In 1980, responding to concerns that a vague footnote in the ITAR could be read to restrain public speech, the State Department announced: "[a]pproval is not required for publication of data within the United States . . . [the footnote] does not establish a prepublication review requirement." Dkt. 158-3 at DOSWASHINGTONSUP00342-43. The State Department then removed the footnote from the ITAR, expressly stating its intent to address First Amendment concerns. *See* 49 Fed. Reg. 47,682, 47,683 (Dec. 6, 1984).

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In addition to the State Department's express removal of any prior restraint in 1984, the ITAR expressly excludes from its scope information found in the public domain. *See* 22 C.F.R. § 120.10(b). Any reasonable person reading ITAR's expansive definition of "public domain" at 22 C.F.R. § 120.11 would conclude that U.S. persons without connections to foreign enterprises can publish technical information in public venues without U.S. government preapproval. *See, e.g.*, *United States v. Edler Indus.*, 579 F.2d 516, 521 (9th Cir. 1978) ("So confined, the statute and regulations are not overbroad [or] an unconstitutional prior restraint on speech.").

In the *Bernstein* litigation[3], the State Department again confirmed that the ITAR does not impose a prior restraint on public speech, noting: "Since 1984, the ITAR has been amended in order to indicate more clearly that publicly available information and academic exchanges are not treated as technical data." Ex. S at 10, ¶ 20 (Second Declaration of William J. Lowell, Department of State Office of Defense Trade Controls, *Bernstein v. U.S. Dep't of State*, No. C 95-0582 (N.D. Cal.) (July 26, 1996)). It declared: "the Department does not seek to regulate the means themselves by which information is placed in the public domain." *Id.* at 11, ¶ 22 (emphasis in the original). Moreover, it forcefully rejected any interpretation of ITAR's public domain provision as imposing a prior restraint on public speech as "by far the most **un**-reasonable interpretation of the provision." *Id.* at 23 (Defendants' Opposition to Plaintiff's Motion for Summary Judgment and in Further Support of Defendants' Motion for Summary Judgment, *Bernstein v. U.S. Dep't of State*, No. C 95-0582 (N.D. Cal.) (Aug. 30, 1996)) (emphasis in original).

[3] *See, e.g.*, *Bernstein v. U.S. Dep't of Justice*, 176 F.3d 1132 (9th Cir.), reh'g in banc granted, 192 F.3d 1308 (9th Cir. 1999); *Bernstein v. U.S. Dep't of State*, 974 F. Supp. 1288 (N.D. Cal. 1997); *Bernstein v. U.S. Dep't of State*, 945 F. Supp. 1279 (N.D. Cal. 1996); *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426 (N.D. Cal. 1996)

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The 2013 State Department letter to Defense Distributed demanding the takedown of the subject files was the abrupt reversal of longstanding regulation. The State Department then issued a proposed rule to restrain public speech. *See* 80 Fed. Reg. 31,525, 31,528 (June 3, 2015). This proposal drew over 9,000 public comments.[4] Most commenters opposed the proposal, including technology industry leaders (e.g., IBM, GE, and others), export control attorneys, and even former State Department employees. *See, e.g.*, Dkt. 63-1 at 38 ("The ITAR proposed requirement for USG authorization to put information into the 'public domain' in 120.11(b) is a reversal of actions 30 years ago to comply with the free speech first amendment to the Constitution."). Not surprisingly, the ITAR was never amended to impose a prior restraint.

C. The record shows compelling justifications for the Temporary Modification and License.

Consistent with the 30-year history of the State Department disclaiming any control of public speech under the ITAR, the record includes decades of Justice Department legal opinions concluding that controlling public speech under the ITAR violates the First Amendment.[5] These opinions pose a compelling justification—"the licensing requirement is presumptively unconstitutional as a prior restraint on speech protected by the First Amendment."[6]

The Plaintiff States further argue that the Justice Department opinions are irrelevant because "the Federal Defendants have not purported to rely on any of these statements . . . ." Dkt. 186 at 24. But there can be no reasonable dispute that the State Department relied on the Justice Department statements because those opinions are part of the Administrative Record and the State

[4] *See* Ex. T (Regulations.gov, "International Traffic in Arms: Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions," *available at* http://bit.ly/2XtSDn0 (last visited June 6, 2018)).
[5] *See* Dkt. 48-1 at Exhibits A-D; Dkt. 158-3 at DOSWASHINGTONSUP00236-252, 239 at n.7, 254-266, 268-272, 274-288, 290-333, and 313; Dkt. 174 at 14-16.
[6] *See* Dkt. 48-1 at 20.

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Department *publicly stated* that it settled the case based on the Justice Department's advice that the agency would lose on First Amendment grounds. Dkt. 35-1 at 5.

D. The proposed transfer is valid.

As detailed in Private Defendants' Motion for Summary Judgment, the proposed rule offers various justifications for the list transfers, including reduced burden hours, reduced costs, and decreased taxpayer costs. Dkt. 174 at 17-18. Plaintiffs do not provide any reasonable explanation for why these justifications do not satisfy the APA. Instead, the Plaintiff States harp on "106,000 emails from members of the public between July 23 and July 27, 2018, urging the Department not to exempt 3D-printable guns." Dkt. 186 at 3. But according to the record, these emails came not from actual individuals, but from a BOT conducting a targeted spam campaign on behalf of an interest group. *See* Dkt. 184-11 at WASHAR0003428; *id.* at WASHAR0003435 ("These are not individuals attempting to contact the Secretary, but this appears to be a BOT conducting a targeted spam campaign . . . ."); *see also* Dkt. 184-5 at WASHAR0000008-9.

The Plaintiff States further argue that the State Department's action was arbitrary and capricious because of "multiple letters from Congressional leaders urging reconsideration of the deregulation of 3D-printable gun files; detailed comment letters from U.S. Senators and public policy organizations," Dkt. 186 at 3; and because the State Department allegedly failed to address Democrat staffer requests. Dkt. 186 at 3-5. But Democrat concerns were countered by requests from over 100 Republican members of Congress. *See, e.g.*, Dkt. 184-6 at WASHAR0001093; Dkt. 184-6 at WASHAR0001098; Dkt. 184-6 at WASHAR0001091-1092; Dkt. 184-8 at WASHAR0002058-2068; Dkt. 184-10 at WASHAR0003034-3035.

No merit lies in the Plaintiff States' complaints about comments not receiving bespoke responses. Several well-established rules of administrative procedure make this clear.

A failure to respond to comments means nothing unless it somehow "demonstrates that the agency's decision was not 'based on a consideration of the relevant factors.'" *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984). None of the Plaintiff States' cherrypicked comments do so.

Comments without "meaningful analysis or data" certainly warrant no response, and neither do comments that "brought to the attention of the agency nothing which it had not already considered." *Id.* These rules apply to virtually all of the Plaintiff States highlighted comments, which add nothing meaningful or new to the State Department's deliberative calculus.

This was also an instance in which agencies need not respond to comments that are "diametrically" or "directly opposed" to the policy's overall "thrust." *Sherley v. Sebelius*, 689 F.3d 776, 784-85 (D.C. Cir. 2012). In other words, the State Department had no obligation to "comment on policy-based challenges to the basic premise of the proposed rule where the agency has already chosen a particular reconciliation of conflicting congressional directives and has previously explained its reasoning." *Baltimore Gas & Elec. Co. v. United States*, 817 F.2d 108, 116 (D.C. Cir. 1987).

Under these principles, the Federal Defendants need not have responded to the Plaintiff States' favorite comments with anything more than the existing explanations. The Plaintiff States' side of this political debate did not get mistreated. They were heard fairly. They just lost.

Conclusion

The Court should issue a summary judgment dismissing this action for lack of subject-matter jurisdiction. Alternatively, the Court should issue a summary judgment dismissing the Private Defendants from the action. In the further alternative, the Court should issue a summary judgment that the Plaintiff States take nothing. Any relief that is awarded to the Plaintiff States should be restricted to conduct taking place in the Plaintiff States' jurisdictions.

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CERTIFICATE OF SERVICE

I certify that on June 7, 2019, I used the CM/ECF system to file this document with the Clerk of the Court and serve it upon all counsel of record.

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